ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D.P. MARSHALL JR., JUDGE

DIVISION III

CACR07-330

6 February 2008

KENNETH DANA BREWTON, APPELLANT	AN APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
v.	[CR 2005-84-G]
STATE OF ARKANSAS, APPELLEE	THE HONORABLE JAMES R. MARSCHEWSKI, CIRCUIT JUDGE

AFFIRMED

A Sebastian County jury convicted Kenneth Dana Brewton of second-degree forgery and possessing drug paraphernalia with the intent to manufacture methamphetamine. He appeals, challenging the sufficiency of the evidence to support both convictions, the circuit court's denial of two motions to suppress evidence, its decision to allow the State to amend the felony information the day of trial, and its related denial of his motion for a continuance.

Because of double-jeopardy concerns, we must address Brewton's sufficiency challenges first. *Standridge v. State*, 357 Ark. 105, 112, 161 S.W.3d 815, 818 (2004). Brewton argues that the circuit court erred in denying his motion for a directed verdict on the possession charge. At the close of the State's case, Brewton moved for a directed verdict on this charge "on general principles," and argued that the State had not proved when or where the offense occurred. On appeal, however, Brewton argues only that his motion should have been granted because evidence found in his home

should have been suppressed. A party cannot change the grounds on appeal for a directed-verdict motion, but is bound by the scope and nature of the argument presented at trial. *Avery v. State*, 93 Ark. App. 112, 120, 217 S.W.3d 162, 165–66 (2005). Brewton therefore failed to preserve this point.

Brewton also challenges the sufficiency of the evidence to support his forgery conviction. To convict Brewton of second-degree forgery, the State had to prove that he forged a check. Ark. Code Ann. § 5-37-201(c)(1) (Supp. 2007). He forged a check if, with the purpose to defraud, he made, completed, altered, counterfeited, possessed, or uttered a check that purported to be the act of a person who did not authorize that act. Ark. Code Ann. § 5-37-201(a). The State alleged that Brewton "uttered" a forged check on 7 June 2005, meaning that he transferred, passed, or delivered a forged check on that date or attempted to do so. Ark. Code Ann. § 5-37-101(7) (Repl. 2006).

The evidence showed that as part of a forgery investigation, a detective distributed fliers with pictures of recently forged checks to local convenience stores and asked the employees to call the police if they witnessed anyone trying to use these checks. On June 7th, police received phone calls from two stores about men trying to pass the forged checks. The callers gave police a description of the vehicle involved, its tag number, and the direction it was traveling. The police were also told that the man attempting to pass one of the checks was a "man about 250 pounds . . .."

Minutes later, police stopped a white truck matching the description and tag number given by the store employees. Brewton was driving the truck, though it was actually registered to his cousin who was not present. John Kaiser was in the truck's passenger seat. The police recognized that Kaiser more closely matched the weight description given by one employee of the man trying to pass the forged check. At trial, Kaiser admitted that he had attempted to pass a forged check that

evening.

Police arrested both men, searched the vehicle, and in the console found several fraudulent checks, a driver's license and social security card in the name "Steven Smith," and a saving's bond in Brewton's name. After obtaining a search warrant, the police searched Brewton's house the next day. They found more fraudulent checks and check-making supplies and equipment.

Brewton's ex-girlfriend testified at trial that she had seen him making checks on his computer. And Brewton's written statement was introduced at trial, in which he admitted that he observed Kaiser making counterfeit checks at his house and that he (Brewton) gave at least one of those checks to an individual in exchange for drugs.

At trial, the jury was instructed on accomplice liability. A person is an accomplice when he aids or encourages the principle in the offense. *Cook v. State*, 350 Ark. 398, 408, 86 S.W.3d 916, 922 (2002). An accomplice is criminally liable for the conduct of the principle and cannot disclaim liability because he did not take part in every act that made up the crime as a whole. 350 Ark. at 409, 86 S.W.3d at 923. Kaiser confessed to attempting to pass a forged check on 7 June 2005. The State provided sufficient evidence that Brewton was at least an accomplice in that act. Viewing the evidence in the light most favorable to the verdict, substantial evidence therefore supports Brewton's second-degree forgery conviction. 350 Ark. at 407, 86 S.W.3d at 922.

Brewton next argues that the circuit court erred in refusing to suppress the evidence seized from the truck that he was driving on June 7th. The court denied Brewton's motion because the evidence was seized as a result of a search incident to a lawful arrest. Considering the totality of the circumstances in our *de novo* review, *Lilley v. State*, 362 Ark. 436, 439, 208 S.W.3d 785, 788 (2005), we see no error. When they stopped the truck, the police had reasonable cause to believe that

Brewton had committed a felony based on the ongoing forgery investigation, the attempted use of forged checks that evening, and the fact that he was driving the vehicle identified by the store employees. Thus his arrest and the search incident to that arrest were lawful. Ark. R. Crim. P. 4.1 and 12.4.

Brewton also argues that the circuit court erred in refusing to suppress evidence found in his house on June 8th during the execution of a search warrant. The warrant was based on Brewton's arrest, evidence found in the truck the night before, and information from a confidential informant that she had observed a computer, copier, ink cartridges, blank check paper, and printed counterfeit checks at Brewton's house within the past four weeks. Brewton first argues that because the evidence found in the truck was illegally obtained, it could not provide the probable cause necessary for the search warrant. We have already rejected the premise of this argument.

Brewton also contends that the affidavit supporting the search warrant contained an inadequate time basis or, in the alternative, that the informant's information was too stale and remote to allow a judge to believe that the contraband would still be in the house. Some reference to time must be included in the affidavit supporting the search warrant. *George v. State*, 358 Ark. 269, 284, 189 S.W.3d 28, 37 (2004). There was. Also, the search warrant was based, not only on the items seen by the confidential informant within the previous month, but also on evidence found in the truck that Brewton was driving the evening before. The information in the affidavit was therefore not stale, remote, or insufficient as to time. Considering the totality of the circumstances, the circuit court committed no error by refusing to suppress the evidence from Brewton's house. 358 Ark. at 282–83, 189 S.W.3d at 36.

Finally, Brewton argues that the circuit court erred in allowing the State to amend the

information on the day of trial and then refusing to grant him a continuance. After the court allowed three pre-trial amendments, the information charged Brewton with manufacturing methamphetamine, a Class Y felony. The circuit court allowed the State to amend that charge the morning of trial to possession of drug paraphernalia with intent to manufacture methamphetamine, a Class B felony. Brewton argues that this amendment changed the nature and degree of the charges against him and violated Arkansas Code Annotated § 16-85-407(b) (Repl. 2005).

Because this amendment did change the charge, we must analyze whether Brewton had adequate notice of, and was prejudiced by, the change. *Hoover v. State*, 353 Ark. 424, 428–29, 108 S.W.3d 618, 620–21 (2003). This amendment resulted in Brewton being charged with a lesser-degree felony. Thus the change in the degree of the crime benefitted rather than prejudiced him. Also, like in *Hoover*—where the supreme court found that the defendant was not prejudiced or surprised by an amendment—Brewton's attorney acknowledged when discussing the amendment that "I'm not saying that I'm caught by surprise, necessarily . . .."

Brewton contends that he was prejudiced nonetheless because, with the new charge, the State had to prove that he actually possessed drug paraphernalia, whereas it did not have to prove that he possessed paraphernalia to convict him of manufacturing methamphetamine. The evidence with which the State proved the possession element, however, was the subject of a suppression hearing two months before trial. Brewton's attorney acknowledged on the morning of trial that "[c]ertainly, I knew that the items that were seized were going to be offered into evidence." We see no prejudice in these circumstances. Because Brewton has not shown that he was prejudiced or surprised by the amendment, the circuit court did not err by allowing the State to amend the information the day of trial. *Hoover*, *supra*.

The circuit court also did not abuse its discretion in denying Brewton's continuance request after the charges were amended. *Stenhouse v. State*, 362 Ark. 480, 488, 209 S.W.3d 352, 358 (2005). This case is not like *Finch v. State*, 262 Ark. 313, 556 S.W.2d 434 (1977), where the State amended the information on a Friday to include that the defendant would be charged as an habitual offender at his trial, which was to start the following Monday. The supreme court noted that Finch's attorney "could not be prepared to investigate, much less prepare to challenge the four previous convictions found by the jury, over the weekend . . .." 262 Ark. at 318, 556 S.W.2d at 437. Here, the amendment resulted in a lesser-degree charge, and Brewton's attorney had known for two months that the evidence used to prove possession was going to be admitted at trial. Therefore, denying Brewton's continuance request was not an abuse of the circuit court's wide discretion over its docket.

Affirmed.

ROBBINS AND GRIFFEN, JJ., agree.